



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Sign Removal Order Issued by
the Department of Transportation to Swiderski
Enterprises and Joe Swiderski – OASIS No. 7140
(Permit No. 37-40481-93)

Case No.: TR-14-0025

In the Matter of the Sign Removal Order Issued by
the Department of Transportation to Swiderski
Enterprises and Joe Swiderski – OASIS No. 7142
(Permit No. 37-40482-93)

Case No.: TR-14-0026

FINAL DECISION

On August 13, 2014, the Department of Transportation (Department) issued sign removal orders to Swiderski Enterprises and Joe Swiderski (Swiderski) for two outdoor advertising signs that are located adjacent to the southbound lanes of Interstate Highway 39 in the City of Mosinee. By letter dated September 12, 2014, Attorney Michael P. Screnock, on behalf of Swiderski Enterprises and Joe Swiderski, requested a hearing pursuant to Wis. Stat. § 84.30(18) to review the sign removal orders. In response to the request, the administrative law judge assigned to the matter conducted a prehearing conference on September 29, 2014. During the prehearing conference, the attorney for the Department indicated that she intended to file a Motion for Summary Judgment in this matter. Accordingly, no evidentiary hearing was scheduled and a briefing schedule for the motion was established.

In accordance with the established schedule, the Department filed its motion and a brief and an affidavit in support of its motion on December 1, 2014. Swiderski filed a response brief and affidavits in support of his response on January 20, 2015. The Department filed a reply brief and supporting documentation on January 28, 2015.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

Swiderski Enterprises and Joe Swiderski, by

Attorney Michael P. Screnock
Attorney John D. Finerty, and
Attorney Tanya M. Salman
Michael Best & Friedrich, LLP
1 South Pinckney Street, Suite 700
Madison, WI 53703

Wisconsin Department of Transportation, by

Attorney Kathleen M. Batha
DOT – Office of General Counsel
P. O. Box 7910
Madison, WI 53707-7910

The Administrative Law Judge issued a Proposed Decision in this matter on June 9, 2015. Joe Swiderski filed objections to the Proposed Decision on June 24, 2015. The Department of Transportation filed a letter in support of the Proposed Decision on June 23, 2015, and a response to Swiderski's objections on June 24, 2015. Swiderski's objections repeated arguments made in his brief filed opposing the Department's Motion for Summary Judgment. Swiderski objects to the findings that the rezoning of the parcel on which the signs are located was not part of comprehensive zoning and that Mosinee's R-1 zoning does not constitute a "business area" for purposes of Wis. Stat. § 84.30. Swiderski also objects to the Administrative Law Judge's determination not to reopen discovery.

Swiderski continues to cite cases holding that spot zoning can provide useful flexibility for comprehensive zoning and is not *per se* illegal. This is not the issue. The rezoning of the Swiderski property on which the subject sites are located from R-1 to B-2 is valid. The issue is whether the rezoning makes the site eligible for outdoor advertising permits. As discussed in the Proposed Decision, pursuant to 23 CFR 750.708(b), the site is not eligible for outdoor advertising permits because it was rezoned primarily to make it eligible for outdoor advertising. Similarly, Swiderski object to the finding that Mosinee's R-1 zoning is not a "business area" for purposes of Wis. Stat. § 84.30. Although Mosinee's ordinance allows some recreational, educational, and utility activities in its R-1 zoning, these land uses are not sufficient to qualify Mosinee's R-1 zoning as a "business area." Swiderski's objections to the findings in the Proposed Decision are not persuasive.

Swiderski also objects to the Administrative Law Judge's determination not to reopen discovery. Swiderski requested an opportunity to discover evidence that he was the victim of selective enforcement by the Department. The Administrative Law Judge denied this request because the Division of hearings and Appeals, as an administrative agency, does not have authority to rule on a constitutional issue. In his objections, Swiderski cites a Division of

Hearings and Appeals' decision that acknowledges a petitioner alleged selective enforcement. The Administrative Law Judge made no finding regarding the allegation. This decision does not constitute authority that the Division of Hearings and Appeals has the ability to consider such a claim. Other than correcting a typographical error noted by the Department and other minor editing, the Proposed Decision is adopted as the final decision in this matter.

Pursuant to Wis. Admin Code § HA 1.10(2), the Division of Hearings and Appeals follows the procedure Wis. Stat. § 802.08 in ruling on motions for summary judgment. The purpose of summary judgment is to obviate the need for a trial where there is no genuine issue to any material fact. *Heck & Paetow Claim Service, Inc. v. Heck*, 93 Wis. 2d 349, 286 N.W.2d 831 (1980). Summary judgment is not available if any disputed facts exist or if reasonable inferences leading to conflicting results may be drawn on the basis of uncontested facts. *Tomlin v. State Farm Mut. Auto Liability Ins. Co.*, 95 Wis. 2d 215, 290 N.W.2d 285 (1980).

The methodology for summary judgment is that the court first examines the pleadings to determine whether claims have been stated and a material fact issue is presented. If the complaint states a claim and the pleading show the existence of factual issues, the court examines the moving party's affidavits for evidentiary facts admissible in evidence or other proof to determine whether that party has made a *prima facie* case for summary judgment. If the moving party has made a *prima facie* case, the court examines the affidavits submitted by the opposing party for evidentiary facts and other proof to determine whether genuine issues exist as to any material fact, or reasonable conflicting inferences may be drawn from undisputed facts, and therefore trial is necessary. *In re Cherokee Park Plat*, 113 Wis. 2d 112, 334 N.W.2d 580 (App. 1983).

In his response to the Department's motion, Swiderski opposed the Department's request for summary judgment and contended that he was entitled to summary judgment reversing the Department's sign removal orders. In this matter, the primary issue is whether the site of the permitted outdoor advertising signs was in a "business area" as defined at Wis. Stats. § 84.30(2)(b) at the time the signs were permitted. No factual disputes exist. Summary judgment is appropriate in this matter.

Findings of Fact

The Administrator finds:

1. Joseph J. Swiderski, Trustee of the Joseph J. Swiderski Family Trust, owns property (Swiderski property) adjacent to Interstate Highway 39 (I-39) in the City of Mosinee, Marathon County. I-39 was formerly designated United States Highway 51 (USH 51). USH 51 was a federal aid highway. The Swiderski property is triangularly shaped and 2.45 acres in size. It is identified as parcel number 37-251-4-2707-214-9984 by the County of Marathon register of deeds.

2. The configuration of the Swiderski property is the result of the relocation of USH 51. Prior to the relocation, USH 51 was on the west side of the Swiderski property. After the relocation, USH 51 is oriented in a southwesterly/northeasterly angle on the east side of the Swiderski property. Old USH 51 forms one side of the triangularly shaped Swiderski property and the relocated USH 51 is the hypotenuse of the triangle.

3. The relocation of USH 51 is shown on exhibit "H" attached to the affidavit of Kathleen Batha. The record in this matter does not include any information indicating when the relocation occurred or describing the project. By reviewing exhibit "H," a plat of right of way acquired for the project; however, it appears that the highway relocation split property owned by Swiderski. Parcel 173 owned by Swiderski is located on the east side of relocated USH 51. From Parcel 174, also owned by Swiderski, the Department acquired 7.69 acres for the relocated highway right of way. The triangularly shaped parcel on which the subject signs are located is on the west side of the relocated highway. It appears that the three parcels were a large rectangularly shaped parcel before the relocation project.¹

4. Prior to 1993, the Swiderski property was zoned R-1, Single Family Residential. By a form dated December 22, 1992, Swiderski petitioned the City of Mosinee City Council to rezone the property from R-1 to "billboard zoning." (Batha Aff., exh "K" attaching exh. "A") In his petition, Swiderski expressly stated that the purpose of requesting the rezoning was so the property would be an acceptable site for outdoor advertising signs. On May 10, 1993, the Mosinee City Council passed an ordinance rezoning Swiderski's property to B-2 Community Service.

5. On July 15, 1993, Swiderski submitted applications to the Department for state permits to erect and maintain two outdoor advertising signs on the property. At the time Swiderski applied for the sign permits, the highway adjacent to the Swiderski property was designated as United States Highway 51 (USH 51). On July 19, 1993, the Department issued permits for two outdoor advertising signs to be located on the Swiderski property. Swiderski caused two signs to be erected sometime after the permits were issued.

6. One sign is located 1657 feet south of the Maple Ridge Road overpass and is identified as OASIS No. 7140 in the Department's outdoor advertising sign data base. The other sign is located 2192 feet south of the Maple Ridge Road overpass and is identified as OASIS No. 7142 in the Department's database. The signs are located in the adjacent area of what was USH 51 at the time they were erected and are intended to be visible from the main-travelled way of the highway.

¹ In his affidavit, Swiderski suggests that one of the subject signs were erected to replace a sign that had to be removed from the Stone Ridge development. The zoning change request form filed by Swiderski states that the reason for seeking the change was, in part, "To have billboard between Stone Ridge & Indian Head golf course removed and moved to the new requested zone area. Swiderski does not state that the sign that was "removed" was lost as part of the highway relocation project. However, if Swiderski lost an outdoor advertising sign as the result of the project, presumably he was compensated for the lost sign by the Department.

7. Except for the two signs, the Swiderski property remains undeveloped. There is no water, sewer or other utility services on the property. The only electrical service is to illuminate the subject signs. On the right of way plat map, the Swiderski property is labelled “Landlocked.” However, in May of 2014, the City of Mosinee accepted jurisdiction from the Department and assumed maintenance responsibility for a bridge over Bull Junior Creek that provides vehicular access to the Swiderski property.

8. USH 51 was reclassified as an interstate highway, I-39, in 1996. The locations where an off-premise outdoor advertising sign are permissible is more limited in the areas adjacent to an interstate highway than along other federal aid primary highways. The Swiderski property would not meet the requirements for permitting an off-premise sign along an interstate highway. However, since the signs were erected before the highway was redesignated as an interstate highway, the requirements for permitting an off-premise outdoor advertising along an interstate highway are immaterial. The signs are lawful as long as they were properly permitted when they were erected and can continue as nonconforming signs. The Department mistakenly issued sign removal orders for the subject signs in 2009 based on an incorrect determination that they were erected after the highway was redesignated an interstate highway. After Swiderski requested an administrative hearing, the Department withdrew those sign removal orders.

9. The parcels immediately west and southwest of the Swiderski property remain zoned R-1. The land north and east of the Swiderski property is in the Town of Kronenwetter. The land use in the Town of Kronenwetter property abutting the Swiderski property is currently predominately commercial. Across the highway from the Swiderski property “a huge semi-truck sales and repair facility” exists. North of Maple Ridge Road (less than a half mile north of the subject signs) “is an entire corridor of commercial and industrial enterprises” on both sides of I-39 (affidavit of Joseph Swiderski).

10. According to the City of Mosinee ordinances, the permitted uses for land zoned R-1 in addition to single family residential include:

- a) Educational (non-boarding) institutions, including elementary and nursery schools and junior or senior high schools;
- b) Golf courses;
- c) Tennis clubs and courts; and
- d) Seminars.

(exh “A” attached to the affidavit of Michael Screnock)

11. There are additional land uses allowed as conditional uses on parcels zoned R-1. Conditional uses include:

- a) Airports and commercial heliports – including flying schools, terminal buildings, and other auxiliary facilities;
- b) Colleges, junior colleges, and universities;
- c) Boarding nursery and elementary schools and junior and senior high schools;
- d) Hospitals;

- e) Electric substations; and
- f) Telephone exchanges.

(exh “A” attached to the affidavit of Michael Screnock)

12. The Department issued sign removal orders to Swiderski for both signs on August 13, 2014. The grounds for the sign removal orders are that the Swiderski property “was not properly rezoned so as to constitute a ‘business area’ for purposes of Wis. Stat. § 84.30 and 23 CFR 750.708(b).” More specifically, the sign removal orders allege that the rezoning of the Swiderski property was not a part of comprehensive zoning and was done to primarily permit outdoor advertising structures. Such spot zoning is not recognized as valid zoning for outdoor advertising control purposes.

13. As explained more fully below, the Swiderski property was not eligible for an outdoor advertising permit at the time the permit was issued. The Department’s issuance of the sign permits issued to Swiderski was in error.

Discussion

As a condition of receiving federal highway funds, states are required to regulate outdoor advertising along federal aid highways, such as USH 51. Pursuant to Wis. Stat. § 84.30(3)(d), after March 18, 1972, the only off-premise advertising signs that can be erected along federal aid highways are ones that will be located in business areas. “Business area” is defined at Wis. Stat. § 84.30(2)(b). Wis. Stat. § 84.30(2)(b) provides:

“Business area” means any part of an adjacent area which is zoned for business, industrial or commercial activities under the authority of the laws of this state; or not zoned, but which constitutes an unzoned commercial or industrial area as defined in par. (k).

Land which has been zoned commercial pursuant to state law is generally eligible for permits for outdoor advertising signs. However, the authority granted to states to make land eligible for outdoor advertising by zoning is limited by 23 CFR 750.708.

23 CFR 750.708 provides:

(a) 23 U.S.C. 131(d) provide that signs “may be erected and maintained within 660 feet of the nearest edge of the right-of-way within areas . . . which are zoned industrial or commercial under authority of State law.” Section 131(d) further provides, “The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act.”

(b) State and local zoning actions must be taken pursuant to the State's zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes.

(c) Where a unit of government has not zoned in accordance with statutory authority or is not authorized to zone, the definition of an unzoned commercial or industrial area in the State-Federal agreement will apply within that political subdivision or area.

(d) A zone in which limited commercial or industrial activities are permitted as an incident to other primary land uses is not considered to be a commercial or industrial zone for outdoor advertising control purposes.

The limitation placed on the authority of states by 23 U.S.C. § 131(d) by 23 CFR 750.708 was implicitly recognized by the Wisconsin Court of Appeals in its decision in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp.*, 135 Wis. 2d 195, 400 N.W.2d 15 (Wis. App. 1986). The court stated:

In relevant part 23 U.S.C. sec. 131(d) (1982) states: "The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for purposes of this Act." The only federal restrictions on the states are found in 23 C.F.R. sec. 750.708 (1986), which requires that all zoning be undertaken pursuant to state zoning laws, that zoning action be part of a comprehensive plan and not primarily to permit outdoor advertising, and that a zone which permits limited commercial or industrial activities incident to other primary land uses may not be considered a commercial or industrial zone.

State law defines a "business area" as any area "zoned for business, industrial, or commercial activities" and requires that zoning be done pursuant to a state or local zoning ordinance or regulation. Secs. 84.30(2)(b) and (l), Stats. Section 59.97(4)(a), Stats., grants the county the authority to zone for business and industry, and that authority is to be liberally construed. Sec. 59.97(13).

Absent a violation of 23 C.F.R. sec. 750.708 (1986), there is no present legal restriction on the broad authority of local governments to determine what areas shall be zoned commercial or industrial areas. (emphasis added)

Wis. Dept. of Transp. V. Off. of the Commr. Of Transp., 135 Wis. 2d 195, at 200-01.

The issue that needs to be decided is whether the signs were lawfully permitted. If they were lawful when permitted and erected, then they may be maintained as legal, nonconforming signs. This determination is dependent on whether the Swiderski property was a business area at the time the signs were permitted. At the time the signs were permitted, the Swiderski property

was adjacent to USH 51, a federal aid primary highway. The stretch of highway passing the subject signs was subsequently redesignated as an interstate highway. The regulation of outdoor advertising signs in areas adjacent to interstate highways is significantly more restrictive than the areas adjacent to other highways. However, since the signs were in place at the time the highway was redesignated, they would be allowed to continue as nonconforming signs.

The factual basis of the Department's Motion for Summary Judgment is that the land on which the subject signs are located was rezoned from residential to commercial for the sole purpose of making the site eligible for outdoor advertising signs. Accordingly, pursuant to 23 CFR 750.708(b), the site is not eligible for outdoor advertising permits. In his response, Swiderski argues that the rezoning was part of a comprehensive zoning plan and; therefore, does not violate 23 CFR 750.708(b). Alternatively, Swiderski contends that R-1 zoning in the City of Mosinee is commercial zoning and that the Swiderski property was a "business area" for purposes of Wis. Stat. § 84.30 prior to the rezoning.

At the time Swiderski applied for permits for the subject signs, the parcel on which the signs were intended to be placed was zoned as B-2 Community Services. This zoning qualifies the parcel as a "business area" under Wis. Stat. § 84.30. Accordingly, the Department issued the requested permits and the signs were erected. The Department subsequently reviewed the zoning history of the parcel and discovered the parcel was rezoned for the express purpose of making the parcel eligible for outdoor advertising permits. The first issue that needs to be decided is whether the rezoning of the Swiderski property to B-2 violated 23 CFR 750.708(b).

23 CFR 750.708(b) requires that zoning which would allow outdoor advertising signs be part of comprehensive zoning. The rezoning of a parcel in order to make the site eligible for outdoor advertising sign, commonly referred to as "spot zoning," violates 23 CFR 750.708(b). The restrictions 23 CFR 750.708(b) places on 23 U.S.C. § 131(d) have been recognized by at least one federal court. See *South Dakota v. Volpe*, 353 F.Supp. (D.S.D. 1973). It is undisputed that Swiderski requested that the City of Mosinee rezone his property for the express purpose of making the site eligible for outdoor advertising sign permits. The City complied with this request. The ordinance rezoning the parcel was limited to Swiderski's property. The Department thoroughly documented the rezoning process for the Swiderski property by the City of Mosinee. Swiderski does not dispute that the rezoning was undertaken in order to make the site eligible for outdoor advertising permits. There is simply no way that the City's action could be construed as part of a comprehensive zoning plan. Accordingly, the rezoning cannot be recognized for the purpose of permitting outdoor advertising. The only way the subject signs were eligible for sign permits is if the property could be considered a "business area" prior to the rezoning.²

² Swiderski devotes a significant amount of his response briefing to arguing that the Division of Hearings and Appeals (Division) does not have the authority to invalidate the City of Mosinee's action rezoning the Swiderski property. This is absolutely correct and the Department is not asking the Division to do so. The question is whether the Swiderski property meets the criteria for an outdoor advertising permit. The Division does have the authority to determine that fact and that is what is at issue in this matter.

The subject sign permits should not have been issued based on the rezoning of the Swiderski property to B-2. The other issue that needs to be decided is whether the Swiderski property was eligible for sign permits based on its previous zoning. Prior to rezoning, the Swiderski property was zoned R-1. The “R” designates residential land uses so on its face this would not be considered a business area. However, Mosinee’s zoning ordinance allows land uses other than residential in its R-1 zoning classification. These uses include educational facilities, golf courses, tennis clubs and courts, and seminaries. Mosinee allows additional land uses in its R-1 zoning as conditional uses. The Wisconsin Court of Appeals opinion in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp.*, *supra*, discusses how to view other permitted uses in a zoning classification that does is not a business category.

The question becomes in the light of the opinion in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp.*, should property classified R-1 in Mosinee be considered a “business area” for purposes of Wis. Stat. § 84.30. The opinion in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp.*, was an appeal of a decision issued by the Office of the Commissioner of Transportation (OCT), an agency that had jurisdiction over appeals of the Department’s regulation of outdoor advertising prior to that function being transferred to the Division of Hearings and Appeals. The decision by the OCT was issued based on a stipulation of facts, similar to the instant decision being based on a motion for summary judgment. Both decisions have limited factual records.

The facts in the instant case are distinguishable from those in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp.* The zoning classification at issue in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp.*, was “Highway Use District.” According to the opinion, the allowable uses for highway use district are residential and agricultural uses. Additionally, as conditional uses the zoning allowed planned unit developments, duplexes, arts and crafts shops, veterinary clinics, and churches. The critical issue in the court’s opinion was whether conditional uses should be considered in determining whether the zoning classification made the site of the proposed sign a “business area.”³

The court concluded that two of the conditional uses, arts and crafts stores and veterinary clinics, were “commercial enterprises.” Therefore, an area classified as a “Highway Use District” in Dodge County was deemed a “business area” for purposes of Wis. Stat. § 84.30. Arts and crafts stores are definitely retail business and one can see how an area zoned Highway Use District in Dodge County was considered a “business area” for purposes of Wis. Stat. § 84.30. The additional permitted and conditional land uses for areas zoned R-1 in Mosinee, schools, hospitals, golf courses, tennis club, and electrical substations, are not similar business, industrial or commercial activities.

³ The uses considered in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp.*, were conditional uses for the zoning classification. Since the opinion in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp.*, was issued, Wis. Stat. § 84.30 was amended to expressly prohibit considering conditional uses. Wis. Stat. § 84.30(2m), provides: “No uses of real property that are authorized by special zoning permission, including uses by conditional use, special exception, zoning variance or conditional permit, may be considered when determining whether the area is a business area.” However, at the time the subject sign permits were issued Wis. Stat. § 84.30(2m) had not been created.

In addition to the holding in *Wis. Dept. of Transp. v. Off. of the Commr. Of Transp*, the Department is required to follow federal statutes and administrative rules when regulating outdoor advertising along federal aid highways. In determining whether a zoning classification should render property a “business area,” one must consider 23 CFR 750.703(a). 23 CFR 750.703(a) provides:

Commercial and industrial zones are those districts established by the zoning authorities as being most appropriate for commerce, industry, or trade, regardless of how labeled. They are commonly categorized as commercial, industrial, business, manufacturing, highway service or highway business (when these latter are intended for highway-oriented business), retail, trade, warehouse, and similar classifications.

A zoning classification with the ambiguous name “Highway Use District” invites further consideration. The zoning classification “Residential” is commonly understood to not allow business or commercial uses. Additionally, the City of Mosinee unequivocally stated that it did not intend for outdoor advertising signs to be permitted in its R-1 zoning. The City of Mosinee ordinances in effect at the time the subject signs were erected provided “A billboard shall only be erected in areas that are zoned commercial or industrial.” (ordinance sec. 10-1-113(a) attached as exh. “R” to the affidavit of Alex Mahfood) Swiderski acknowledged this restriction when he petitioned to have his property rezoned from R-1 to B-2 so that it would be eligible for outdoor advertising sign permits. Property zoned R-1 in the City of Mosinee in 1993 was not a “business area” for purposes of Wis. Stat. § 84.30. The Department has shown that the permits for the subject signs were issued by mistake and should be revoked. If the permits are revoked, the signs cannot be lawfully maintained.

Alternatively, Swiderski argues that even if the subject sign permits were issued by mistake, the Department should be estopped from revoking the permits. The elements of an estoppel defense are:

- 1) Action or nonaction which induces
- 2) Reliance by another
- 3) To his detriment.

State v. City of Green Bay, 96 Wis. 2d, 195, at 205, 291 N.W.2d 508 (1980).

There is a suggestion that Swiderski relocated an outdoor advertising sign that may have been lost because of the relocation of USH 51 to the parcel. Additionally, the City of Mosinee had jurisdiction and maintenance of a bridge over Bull Junior Creek transferred to it from the Department. The purpose of this transfer was to create access to the Swiderski parcel. Assuming that these actions were taken in reliance on the issuance of the subject sign permits, the elements of estoppel might be present in this case. However even if the elements of estoppel are present, the principle is well established that estoppel is not available against governmental bodies when the governmental action involves a police power. In its opinion in *Department of Revenue v. Moebius Printing Co.*, 89 Wis.2d 610, 279 N.W.2d 213 (1979), the Wisconsin Supreme Court commented:

We have not allowed estoppel to be invoked against the government when the application of the doctrine interferes with the police power for the protection of the public health, safety or general welfare. (citations omitted)

DOR v. Moebius, 89 Wis.2d 610, at 639

The regulation of outdoor advertising is considered a police power. *J & N Corp. v. Green Bay*, 28 Wis.2d 583, at 585, 137 N.W.2d 434 (1965). Accordingly, estoppel cannot be invoked against the Department in this matter and the Department's removal orders must be affirmed. If Swiderski can show that he reasonably relied on the Department's issuance of the sign permits to his detriments, he may be entitled to compensation for the loss of the signs. However, the Division of Hearings and Appeals does not have the authority to order the Department to pay compensation. The proper forum to seek compensation from the Department is the State of Wisconsin Claims Board.

Swiderski also requested that if his Motion for Summary Judgment is denied that he be allowed to conduct additional discovery to support a defense of selective enforcement. Selective enforcement is a constitutional issue and, as such, is beyond the scope of an administrative proceeding. A claim for damages or equitable relief based on a determination that Swiderski was the victim of selective enforcement must be made in another forum. The Division of Hearings and Appeals will not reopen discovery in this matter to allow discovery that may only be used in another forum. Although the Division of Hearings and Appeals does not have the authority to consider a claim of selective enforcement, it should be noted that such a claim appears dubious. Swiderski is basing this claim on the fact that the Department earlier issued sign removal orders for both signs which were subsequently withdrawn.

The earlier sign removal orders were based on the mistaken assumption that the signs were adjacent to an interstate highway when they were permitted. Upon discovering that the signs were permitted and erected before USH 51 was redesignated as I-39, the removal orders were withdrawn. However, emails from the Department's attorney at the time the removal orders were withdrawn expressly warned Swiderski that if other grounds for removal were discovered the orders may be reissued. It is also questionable whether Swiderski has sustained any damages as a result of the Department's actions. Although Swiderski obviously incurred expenses in erecting and maintain the signs as well as attorney fees defending the earlier sign removal orders, he also received the benefit of over 20 years of revenue generated by the signs. The Department has shown that the permits for the subject signs were issued by mistake and should be revoked. If the permits are revoked, the signs cannot be maintained. The Department's sign removal orders are, therefore, affirmed.

Conclusions of Law

The Administrator concludes:

1. Swiderski does not dispute that the parcel on which the subject signs are located was rezoned from R-1 to B-2 for the sole purpose of making the sites eligible for off-premise outdoor advertising permits. 23 CFR § 750.708(a) and (b) provides:

(a) 23 U.S.C. 131(d) provide that signs “may be erected and maintained within 660 feet of the nearest edge of the right-of-way within areas . . . which are zoned industrial or commercial under authority of State law.” Section 131(d) further provides, “The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act.”

(b) State and local zoning actions must be taken pursuant to the State’s zoning enabling statute or constitutional authority and in accordance therewith. Action which is not a part of comprehensive zoning and is created primarily to permit outdoor advertising structures, is not recognized as zoning for outdoor advertising control purposes.

Pursuant to 23 CFR § 750.708(b), the zoning change for the parcels on which the subject signs are located cannot be recognized for “outdoor advertising control purposes.”

2. R-1 zoning in the City of Mosinee is not a “business area” as that phrase is defined at Wis. Stat. § 84.30(2)(b). The Swiderski property was not eligible for outdoor advertising sign permits prior to the rezoning. Accordingly, the sign permits were issued to Swiderski in error and should be revoked.

3. The subject signs were erected in the adjacent area of a federal aid highway and, therefore, cannot be maintained without permits. Since the Department’s decision to revoke the permits for the signs is affirmed, the signs can no longer be maintained. Pursuant to Wis. Admin Code § Trans 201.09, the signs are subject to removal as illegal signs. The Department’s sign removal orders must also be affirmed.

4. The regulation of outdoor advertising is considered a police power. *J & N Corp. v. Green Bay*, 28 Wis.2d 583, at 585, 137 N.W.2d 434 (1965). Estoppel is not available against governmental bodies when the governmental action involves a police power. *Department of Revenue v. Moebius Printing Co.*, 89 Wis.2d 610, 279 N.W.2d 213 (1979). Accordingly, estoppel is not available to Swiderski as a defense to the Department of Transportation’s sign removal orders in these matters.

5. Pursuant to Wis. Stat. §§ 84.30(18) and 227.43(1)(bg) the Division of Hearings and Appeals has the authority to issue the following orders.

Orders

The Administrator orders:

1. For the reasons stated above, the Department of Transportation's revocation of the permit for OASIS No. 7140 is affirmed. The sign cannot be maintained without a permit. Accordingly, the sign removal order for the subject sign issued to Swiderski by the Department of Transportation and dated August 13, 2014, is also affirmed.

2. For the reasons stated above, the Department of Transportation's revocation of the permit for OASIS No. 7142 is affirmed. The sign cannot be maintained without a permit. Accordingly, the sign removal order for the subject sign issued to Swiderski by the Department of Transportation and dated August 13, 2014, is also affirmed.

Dated at Madison, Wisconsin on July 24, 2015.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: _____
Brian Hayes
Administrator

NOTICE

Set out below is a list of alternative methods available to persons who may wish to obtain review of the attached decision of the Division. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (1) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Any petition for judicial review shall name the Division of Hearings and Appeals as the respondent. The Division of Hearings and Appeals shall be served with a copy of the petition either personally or by certified mail. The address for service is:

DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400

Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. § 227.52 and 227.53 to insure strict compliance with all its requirements.